

H. E. HUNEWILL CONSTRUCTION CO., INC.

IBLA 93-242

Decided

Appeal from a decision of the Sonoma-Gerlach (Nevada) Resource Area Office, Bureau of Land Management, assessing trespass damages for unauthorized removal of sand and gravel. NV-020-4-721.

Affirmed in part; set aside and remanded in part.

1. Materials Act--Mineral Lands: Mineral Reservation--
Taylor Grazing Act--Trespass: Generally

Where a party removed sand and gravel owned by the United States without any prior authorization from BLM, a finding of trespass is properly affirmed. Where lands are patented pursuant to sec. 8 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315g (1970), all mineral deposits in the lands (including sand and gravel) are reserved to the United States. A decision assessing damages for unintentional trespass for removal of sand and gravel by the owner of the surface is properly affirmed where such a reservation is present.

2. Estoppel--Minerals Lands: Mineral Reservation--
Trespass: Generally

BLM's failure to come forward prior to extraction to assert the United States' ownership of the sand and gravel under a mineral reservation in a patent does not provide a basis for estopping BLM from collecting damages for unintentional trespass when the materials are removed without BLM's consent.

3. Appraisals--Trespass: Measure of Damages

In challenging a BLM appraisal, an appellant bears the burden of proving by a preponderance of the evidence that the methodology employed by BLM in an appraisal conducted to determine trespass damages was flawed and/or that the value assigned to the commodity appraised exceeded its fair market value. A

BLM appraisal may be set aside even though appellant had not done an independent appraisal where appellant makes a comparison that raises significant questions concerning its accuracy. Where the appraisal fails to identify the lessor, legal description, acreage, or term of the comparable leases, so that it is not possible to ascertain from the appraisal whether the price charged in the comparables included reclamation costs (which are properly excluded from assessment of trespass damages), the assessment of damages is properly set aside and remanded for preparation of a new appraisal.

4. Appraisals--Trespass: Measure of Damages

Although appellants generally bear the burden of establishing that comparables used by BLM in an appraisal are not representative because other factors have been improperly excluded, that approach is not appropriate where BLM does not adequately identify the comparable leases used in its appraisal, as the appellant has no basis to make its case.

5. Appraisals--Trespass: Measure of Damages

It is error for BLM to value sand and gravel based on comparable leases selling sand and gravel of higher quality without attempting to quantify the differences in quality, and an assessment of trespass damages based on such assessment is properly set aside and remanded with instructions to consider the cost that would be involved in screening and processing the material in order to render it commercially saleable as high quality material, and adjust its valuation accordingly.

APPEARANCES: Matthew C. Addison, Esq., and Sylvia Harrison, Esq., Reno, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

H. E. Hunewill Construction Company, Inc. (HEHCC), has appealed from the February 3, 1993, decision of the Sonoma-Gerlach (Nevada) Resource Area Office, Bureau of Land Management (BLM), requiring payment of trespass damages for the unauthorized removal of sand and gravel.

The dispute involves approximately 80 acres in Grass Valley, Humboldt County, Nevada, near Winnemucca, Nevada. ^{1/} The surface estate

^{1/} The land is described as the SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, and NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24, T. 35 N., R. 37 E., Mount Diablo Meridian.

of that land is owned by HEHCC, but the mineral estate is owned by the United States by virtue of a reservation in an October 10, 1967, patent (No. 27-68-0059) from the United States. The patent, which encompassed a total of 703.78 acres of land, was effected pursuant to section 8 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315g (1970) (repealed effective Oct. 21, 1976, by section 705(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2792-93). Pursuant to that statute, it expressly reserved to the United States "[a]ll mineral deposits in the lands so patented, and to it, or persons authorized by it, the right to prospect, mine and remove such deposits from the same under applicable law." The patented surface estate of part of this land (i.e., about 160 acres situated in the S½ NE¼ and N½ SE¼ of sec. 24) was deeded to HEHCC on August 29, 1990.

It is undisputed that HEHCC conducted a sand and gravel operation at that location, including operating an asphalt/concrete "batch plant." According to the case record, BLM detected the unauthorized removal of sand and gravel from the land on October 16, 1990, when a BLM geologist observed removal operations conducted by HEHCC. 2/ BLM notified HEHCC on October 29, 1990, that the United States owned the sand and gravel that had already been removed and that HEHCC must pay for it.

In order to determine the volume of sand and gravel removed by HEHCC, BLM measured the various dimensions of the pit from which they were taken in January 1991, calculating that HEHCC had removed a total of 23,229 cubic yards of sand and gravel. In June 1992, BLM appraised the sand and gravel removed, relying on comparable sales and leases in the Winnemucca area, in order to determine their fair market value, arriving at a value of \$0.45/cubic yard. BLM set the total value of the sand and gravel removed at \$10,453.

On September 23, 1992, BLM notified HEHCC of the amount and value of the sand and gravel deemed to have been removed in unintentional trespass and requested it to pay \$10,453 in settlement of the trespass on or before November 1, 1992. The letter was received by HEHCC on September 24, 1992, but no payment was forthcoming.

In his February 3, 1993, decision, the Area Manager stated that HEHCC had violated the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994), and its implementing regulations. 43 CFR 3603.1. He required HEHCC to submit payment of \$10,453 in trespass damages within 15 days of receipt of the decision. Accompanying the decision was a "Trespass Notice" to HEHCC and a "Bill for Collection" naming HEHCC as "payer." HEHCC appealed from the February 1993 BLM decision.

2/ As discussed below, appellant alleges that BLM had for many years been aware of sand and gravel removal on other split-estate lands in the vicinity. It is unnecessary to resolve that question.

[1] Appellant does not dispute either that it removed 23,229 cubic yards of sand and gravel from the land or that it was not authorized by BLM to do so. Nor does it dispute before us that the sand and gravel is owned by the United States. ^{3/} A reservation of all minerals to the United States in a patent of public lands pursuant to 43 U.S.C. § 315g (1970) reserves valuable deposits of sand and gravel found thereon. United States v. Isbell Construction Co., 4 IBLA 205, 212-15, 78 I.D. 385, 388-90 (1971).

As provided by 43 CFR 3811.2-9, lands patented with mineral reservations to the United States under the Taylor Grazing Act, 43 U.S.C. § 315g (1970), are subject to appropriation under the mining or mineral leasing laws for the reserved minerals. Amax Specialty Metals Corp., 100 IBLA 60, 61 (1987).

Appellant contends that the Board should overturn BLM's trespass action as arbitrary and capricious, based on the fact that BLM failed to take any action against it until after it had purchased the property in August 1990 (at an asserted cost of \$90,000) for the purpose of engaging in sand and gravel removal, obtained State and local approval for such operations, constructed an access road, water well, asphalt/concrete batch plant, and made other improvements (totalling in excess of \$100,000), and removed the sand and gravel between August and October 1990 (SOR at 3-4, 7-8). It also notes that BLM has failed to take any action against the adjoining and equally unauthorized sand and gravel operation of T. G. Sheppard, on lands that are subject to the same 1967 mineral reservation, especially since operations were ongoing at the time appellant purchased its property (SOR at 4-5, 8). ^{4/}

Nothing asserted by appellant undermines BLM's conclusion that appellant removed sand and gravel owned by the United States without any prior authorization from BLM. Therefore, the underlying factual support for BLM's finding of trespass and resulting assessment of trespass damages is properly affirmed. Such action was properly taken pursuant to the Materials Act of 1947 and 43 CFR 3603.1 and 9239.0-7 and was not arbitrary and capricious. BLM's decision that there was an unintentional trespass and that damages are due is affirmed.

[2] Although it does not characterize its argument as such, appellant effectively seeks to have the Board hold that BLM is estopped from assessing any damages for trespass because, acting in reliance on BLM's

^{3/} Appellant indicates that it has raised the question of ownership in a Federal district court proceeding (SOR at 8 n.2). As we have not been advised of the outcome of such proceeding, we shall presume that the action has no impact on the present appeal.

^{4/} The adjoining operation, known as the "Humboldt Ready-Mix Pit," is situated on the S½ SE¼ SE¼ of sec. 24. There is evidence that it may have been operated for up to 20 years prior to appellant's purchase (SOR Exh. F).

failure to assert the United States' ownership of the sand and gravel under the 1967 mineral reservation, appellant had taken steps to remove those minerals.

Appellant cites its expenses, apparently to show that it lost money in reliance on BLM's failure to inform it that the minerals were Federally-owned (SOR Exh. D). However, only actions taken by appellant before BLM asserted the United States' rights to the minerals could properly be regarded as having been in reliance on any such failure. Most of appellant's costs were incurred long after BLM notified appellant that it was in trespass. However, as appellant did incur some expense, assertedly in reliance on BLM's failure to notify it of the United States' interest in the minerals, we will address appellant's assertion of estoppel.

Claims of estoppel are considered by the courts on the basis of four elements, which are described in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970): (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe that it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. Terra Resources, Inc., 107 IBLA 10, 13 (1989).

Estoppel is an extraordinary remedy, especially as it relates to public lands and cannot be used to defeat BLM's protection of the interests of the United States based on its failure to act or neglect of duty. 43 CFR 1810.3; James W. Bowling, 129 IBLA 52, 56 (1994); So. Way Co., 123 IBLA 122, 128 (1992).

Furthermore, estoppel against the Government in matters concerning the public lands must be based upon "affirmative misconduct" such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); D. F. Colson, 63 IBLA 221 (1982); Arpee Jones, 61 IBLA 149 (1982).

We have expressly ruled that, as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be "in the form of a crucial misstatement in an official decision." Henry E. Krizman, 104 IBLA 9, 11 (1988); United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975) (quoting Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974)). We find no affirmative misconduct by BLM, that is, misrepresentation or concealment of a material fact. See Schweiker v. Hansen, 450 U.S. 785, 788-89 (1981); United States v. Ruby Co., 588 F.2d at 703-04; James W. Bowling, 129 IBLA at 54-55. There is no evidence that BLM ever either affirmatively represented to appellant that the sand and gravel was not owned by the United States or actively sought to conceal the fact that they were owned by the United States. BLM's silence on this score cannot be construed as affirmative misconduct. BLM is under no obligation to actively seek out property owners or prospective purchasers of property to put them on notice as to any limitations on their property in favor of

the United States. It appears that appellant finds itself in trespass because of its acknowledged failure to inquire adequately into the ownership of the land. 5/

We have no reason to dispute appellant's assertion that it did not know that the United States owned the sand and gravel or even that the land was subject to a mineral reservation in favor of the United States, at the time of its August 1990 purchase. Indeed, it appears that BLM also recognized that fact, as shown by its decision to assess charges only for unintentional trespass. However, it is established that, in order to successfully invoke estoppel, a party must have been justifiably ignorant of the true state of affairs. In the present case, appellant must establish that it had no way of determining that the minerals were owned by the United States. The fact that the land was subject to a mineral reservation was noted on the Master Title Plat for the township, where the relevant part of sec. 24 bore the notation "All Min." In these circumstances, it cannot be said that appellant was ignorant of the true facts.

Nor can we find a basis to estop BLM because it may have failed to bring a trespass action against the operator of a pit on land adjoining the HEHCC property. Even if BLM was aware of such operation, which has not been proven here, it would not be barred from enforcing the law in the present case. It is axiomatic that an agency's failure to enforce governing laws in one case does not prevent it from doing so in others. 6/

[3] Appellant also concedes that, given the unauthorized removal of sand and gravel, BLM is entitled to assess damages under the Materials Act of 1947, and its implementing regulations. 43 CFR 3603.1; Wesley Corp., 130 IBLA 311, 313 (1994); Nielson v. BLM, 125 IBLA 353, 363 (1993). Nor does it challenge BLM's determination of the amount of material removed. Rather, it primarily contends that BLM has improperly calculated the

5/ The record contains several references to Loren Hunewill's acknowledgments that title was not researched. A conversation record with Hunewill dated Oct. 29, 1990, indicates that Hunewill said that "all he saw was the assessor's map which didn't show a different ownership of the minerals."

A conversation record with Terry Miller of Century 21 indicates that he said that "they sold not knowing or investigating the subsurface and assuming that the mineral estate was going with the surface," and that Hunewill "purchased the 80 acres * * * assuming that he was purchasing the gravel estate with the surface." The misunderstanding was later attributed to

"an error in the title transfer documents" (BLM Notes on Jan. 11, 1991, meeting with Harvey and Loren Hunewill). The Aug. 29, 1990, deed to HEHCC, which is in the record, makes no reference to the mineral estate but does not appear to transfer full title.

6/ We note that the Area Manager informed appellant's counsel in an Aug. 14, 1992, letter that BLM was then pursuing a trespass action with respect to the removal of gravel from the adjoining property. Even assuming such action was belated, it nevertheless demonstrates BLM's assertion of United States' ownership of the gravel.

damages owed for the trespass by failing to rely on comparable transactions in valuing the sand and gravel taken from the land (SOR at 1, 5-7).

In challenging a BLM appraisal, an appellant bears the burden of proving by a preponderance of the evidence that the methodology employed by BLM was flawed and/or that the value assigned to the land or commodity exceeded its fair market value. See London Bridge Broadcasting, Inc., 130 IBLA 73, 77 (1994); Universal City Studios, Inc., 120 IBLA 216, 222 (1991). An appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the charges are excessive. See KSEI, Inc., 120 IBLA 266, 267 (1991), and cases cited; High Country Communications, 105 IBLA 14, 16 (1988); but see Lone Pine Television, Inc., 113 IBLA 264, 266 (1990) (setting aside and remanding a BLM appraisal even though appellant had not done an independent appraisal, because it had made a "comparison" that raised "significant questions" concerning the accuracy of the BLM appraisal).

The BLM appraiser used the comparable transaction method of appraisal, which is the preferred method where there is sufficient data regarding such transactions and appropriate adjustments are made for any differences in terms of relevant factors affecting fair market value between the subject and these transactions. See Richard C. Nielson, 129 IBLA 316, 325 (1994).

In so doing, she relied on a total of five comparable transactions, three of which were sales by BLM reporting a uniform value of \$0.35/cubic yard for low quality material "not suitable for mixing concrete," but "[u]sed as common barrow or fill," located 3 miles from Winnemucca. The other two were leases by private landowners to T. G. Sheppard Construction Company, reporting a uniform value of \$0.45 to \$0.50/cubic yard for "high quality sand and gravel" and "high quality undifferentiated sand and gravel or barrow" within 10 miles of Winnemucca (Appraisal at 1-2). ^{7/}

The appraiser determined that, in general, sand and gravel from the subject land is of "fair quality" (Appraisal at 2). However, she stated that it can be improved to high quality (including meeting the specifications for concrete) by the removal of undersized and oversized material through selective mining, screening, and processing. She did not estimate the expense involved in improving the material but simply valued them at the lower end of the value for high quality material, i.e., \$0.45/cubic yard.

The \$.045/cubic yard valuation was arrived at using the presumption that costs of reclamation of the site would be borne by the trespasser:

^{7/} The BLM appraiser described the difference between low and high quality sand and gravel as follows:

"Low quality sand and gravel typically does not meet specifications for concrete and/or contains a high percentage of fines and waste. Low quality material is used mainly as barrow. High quality sand and gravel is able to meet specifications for concrete, and has a low percentage of fines and waste."
(Appraisal at 2).

"Rehabilitation costs associated with the project would be the responsibility of the surface owner" (Appraisal at 2). BLM further explained as follows in a August 14, 1992, letter to counsel for HEHCC:

Standard operating procedure for the BLM in a negotiated sale on federal surface is to appraise the value of the mineral exclusive of reclamation costs. The contractor buys the gravel from [BLM] at the appraised price and is also responsible for completing reclamation to BLM specifications. With community pits, the reclamation cost is calculated separately from the mineral royalty and a per ton fee is charged in addition to the royalty. The additional fee is used to fund pit reclamation. * * * Split estate land with private surface and federal minerals is treated the same way except that BLM does not have jurisdiction over the surface so the surface owner can have the contractor reclaim or not reclaim as he desires and as state and local laws might dictate.

BLM thus used its in-place "royalty" value, i.e., the purchase price that would have been paid to the United States for the sand and gravel as of June 30, 1992, as if the right to mine and remove those materials (including use of the surface reasonably incident thereto) had been granted to appellant.

Appellant does not contend that this was improper. Nor do we find that it was, as BLM acted in accordance with Nevada law. See Wesley Corp., 130 IBLA at 313; CM Concepts of Nevada, 126 IBLA 134, 138-39, 139 n.7 (1993). 8/ However, appellant points out that it is not possible to ascertain from the appraisal what type of lease arrangement was involved in the

8/ In Browne-Tankersley Trust, we held, in a split estate situation, that the in-place value of the Federal sand and gravel taken in trespass must be determined by first taking the royalty value derived from comparable sales in the case of private surface/private mineral and then subtracting the actual damage to the surface estate (payable to the surface owner) in order to arrive at the lesser in-place value that the United States would have received, since it did not also own the surface estate. See United States v. Browne-Tankersley Trust, 98 IBLA 325, 341, 346-48 (1987); Browne-Tankersley Trust, 76 IBLA 48, 51 (1983). In this way, the United States does not receive the surface damage component of the royalty value derived from the comparable private sales, to which it is not entitled as the mineral estate owner. As we said in Curtis Sand & Gravel Co., 95 IBLA 144, 156, 94 I.D. 1, 7-8 (1987):

"The United States is simply not entitled to be compensated for the value of [private] rights and privileges which it could not have granted. In determining trespass damages, BLM must factor out such * * * rights and privileges to the extent they affected the royalty rate set in the private lease BLM relies upon. [Emphasis added.]"

We are unsatisfied that the comparables cited by BLM in its appraisals used that approach.

comparables. Appellant also asserts that the appraisal's methodology was so defective as to render it inadequate, noting the failure to identify the lessor, legal description, acreage, or term of the comparable leases and concluding that the appraisal was unacceptable (SOR Exh. I). We agree with appellant on both points.

The foundation of the appraisal is inadequate. Details of the five comparable transactions in the appraisal report are extremely vague. No details are given as to the site from which the three BLM sales were made, other than the fact that it is "3 miles from Winnemucca." We cannot tell whether this was a community pit and, if so, whether the \$.035/cubic yard would include any additional fee for reclamation or other costs associated with use of the surface estate.

The details of the sales to T. G. Sheppard Construction Company are almost nonexistent. Referring to BLM's Winnemucca District Regional Appraisal, we learn only that the lessor for "Lease No. 12" is a "private land owner," that is located in "Humbolt [sic] County, within 10 miles of Winnemucca," that the source is "Sand and gravel, undifferentiated Barrow material," and that the "material is reported to be of high quality." No size or legal description of the site is provided; the term of the lease is not disclosed. The source of the information is an unnamed "representative" of the purchaser. The same infirmities apply to "Lease No. 13." It is not possible to determine whether the purchase price included any additional fee for reclamation or other costs associated with use of the surface estate.

The absence in the record of a proper foundation for the appraisal not only renders it impossible for this Board to review, it makes it impossible for a party against whom it is applied to confirm the accuracy of the assessment. Of particular concern is BLM's failure to specify the term of the agreement, as the contract price may be expected to vary greatly over time. Similarly, BLM's failure to specify the source of its information renders it impossible to impeach.

[4] Appellant also notes that BLM did not report the "amount of [material] extracted, access to the property, proximity to the site of use, or other information relevant to the price a willing buyer would pay for the material." In other cases, we have placed the burden on appellants to establish that the comparables used by BLM are not representative because other factors have been improperly excluded. See, e.g., MCI Telecommunications, Inc., 115 IBLA 117, 126-30 (1990). That approach is not appropriate here, in view of the plain impossibility of identifying the comparable leases used by BLM in its appraisal. On remand, BLM should address these factors in connection with a new appraisal.

[5] Finally, we agree with appellant that, in valuing the sand and gravel removed from the subject land, BLM improperly applied the value of high quality material to all of the material taken in trespass even though it admittedly found that some of the trespass material was oversized and undersized. BLM did not properly quantify the difference in

value between the high-quality material involved in the comparable sales and that involved here. On remand, BLM should consider the cost involved in screening and processing the material in order to render it commercially saleable as high quality material and adjust its valuation accordingly.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside and remanded in part.

David L. Hughes
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge